Supreme Court, U.S.
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No. 05-381

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

Petitioner files this supplemental brief pursuant to Rule 15.8 of the Rules of this Court to respond briefly to an erroneous assertion in Respondent's Supplemental Brief regarding the state of the record. Respondent tries to create the impression (Supp. Br. 3-4) that the Solicitor General's only objection to the jury instruction in this case is "the instruction's reference to 'paying a higher price for logs than necessary.'" Respondent goes on to assert that this issue is not before this Court because petitioner supposedly did not challenge this aspect of the jury instruction in the court below (*id.* at 4 & n.4). Respondent is wrong on both counts.

To begin with, the government's disagreement with the jury instruction is not limited to the single phrase quoted by respondent. The government's position is that "[b]ecause the court of appeals held that a plaintiff need not satisfy either prong of the *Brooke Group* standard in order to prevail on a predatory-bidding claim, its decision was erroneous" (U.S. Br. 14-15 (footnote omitted)). The language respondent quotes – from the penultimate paragraph of the Solicitor General's amicus brief – explains the anticompetitive effects of the Ninth Circuit's ruling, not the government's position regarding the appropriate jury instruction.

The *Brooke Group* issue is properly before this Court. The issue was squarely raised in the district court, where petitioner raised the *Brooke Group* issue in pre-trial briefing and objected to the proposed instruction (including the language quoted by respondent)[1] on the ground that it was "akin

[1] The district court itself originally proposed a jury instruction that permitted a finding of liability based on a determination that "the Defendant purchased more logs than it needed, or paid a higher price for logs than necessary, in order to prevent the Plaintiffs from obtaining the logs they needed at a fair price" if the jury also found

to a predatory pricing instruction," which petitioner argued was governed by the objective two-part test of *Brooke Group*. Volume 8A, April 17, 2003, at 6:2-3; *id.* at 6:3-8 ("The U.S. Supreme Court test for predatory pricing as announced in the *Brook Group* [sic] case in 1993 is that plaintiffs must show below-cost pricing or that defendant operated at a loss. This is a bright-line test announced in the *Brook Group* [sic] case. Defendant takes exception to that entire paragraph.").

The district court rejected petitioner's objection because it agreed with respondent that "the *Reid Brothers* case makes it very clear that preclusive bidding is exclusionary conduct regardless of whether or not you can show recoupment" (*id.* at 9:21-24) and "this is not a predatory pricing paragraph" (*id.* at 12:7-8). The court accordingly eliminated the recoupment language from the last sentence of the proposed instruction. See Final Jury Instructions at 10. Weyerhaeuser objected again. Volume 8A, April 17, 2003, at 12:10-11 ("So the record is clear, defendant does take exception to that instruction * * * as modified."). The court of appeals squarely addressed the *Brooke Group* issue, as respondent acknowledges. Supp. Br. 4 n.4; see also Pet. Reply Br. 2 n.2.

The remainder of respondent's supplemental brief simply recycles arguments from its brief in opposition in an attempt to dispute the Solicitor General's conclusion that this Court should grant review because the court of appeals' erroneous decision "threatens to chill procompetitive conduct by firms in a wide variety of markets" (U.S. Am Br. 19). The Solici-

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that "Defendant had a reasonable expectation that it could subsequently recoup any losses it had sustained through this conduct, either by paying lower log prices in the future or by charging higher prices for Defendant's products due to a reduction in competition from other saw mills." Draft Jury Instructions at 10.

tor General's neutral assessment of that question surely is more credible than respondent's self-interested assertions.

The Solicitor General is not reluctant to recommend against certiorari in cases in which he concludes the issue presented is not sufficiently important or review by this Court is not warranted for other reasons – as in No. 02-1865, *3M Co.* v. *LePage's Inc.*, cert. denied, 124 S. Ct. 141 (2004), a filing relied upon by respondent in its brief in opposition (at 18-19).[2] The government's recommendation in this case is strongly supported by amicus briefs reflecting the views of individual companies and associations from every segment of the economy – including the very sellers of timber that the Ninth Circuit's rule supposedly is designed to protect – as well as by the views of legal scholars. See U.S. Am. Br. 19 n.13.

For the foregoing reasons, and those stated in the petition and reply brief, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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[2] For other amicus briefs filed by the Solicitor General this Term recommending against certiorari, see, *e.g.*, Brief for the United States as Amicus Curiae, *Nielson v. Private Fuel Storage*, No. 04-575 (Sept. 2005); Brief for the United States as Amicus Curiae, *Laboratory Corp. of Am. Holdings v. Metabolite Labs., Inc.*, No. 04-607 (Aug. 2005); Brief for the United States as Amicus Curiae, *Carpenters' Health & Welfare Trust for S. Cal. v. Vonderharr*, No. 04-1049 (Oct. 2005); Brief for the United States as Amicus Curiae, *Vines v. EEOC*, No. 04-1615 (Dec. 2005); Brief for the United States as Amicus Curiae, *FTC v. Schering-Plough Corp.*, No. 05-273 (May 2006); Brief for the United States as Amicus Curiae, *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation Dev. Comm'n*, No. 05-331 (May 2006); Brief for the United States as Amicus Curiae, *Empresa Cubana Del Tabaco v. General Cigar Co., Inc.*, No. 05-417 (May 2006); Brief for the United States as Amicus Curiae, *Burke v. Wachovia Bank, N.A.*, No. 05-431 (May 2006); Brief for the United States as Amicus Curiae, *SmithKline Becham Corp. v. Apotex Corp.*, No. 05-489 (May 2006).

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